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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications)	
Capability to All Americans in a)	
Reasonable and Timely Fashion, and)	CC Docket No. 98-146
Possible Steps to Accelerate Such)	
Deployment Pursuant to Section 706 of)	
the Telecommunications Act of 1996)	
)	

**COMMENTS OF THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.**

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EXECUTIVE SUMMARY

As the Commission has previously recognized, fixed wireless broadband providers are an emerging resource for ubiquitous, cost-efficient provision of advanced telecommunications services. Thus, the fixed wireless broadband industry will play a critical role in the Commission's effort to ensure that advanced telecommunications capability is provided to all Americans in a reasonable and timely manner. As the principal trade association for the fixed wireless broadband industry, The Wireless Communications Association International, Inc. ("WCA") has a direct and substantial interest in this proceeding.

As noted in the recent OPP Working Paper on the provision of Internet services by cable television operators, "the Telecommunications Act of 1996 radically restructured the regulatory landscape for the provision of local telephone communications services, attaching new consequences to statutory definitions from the technologies of the past." This observation has particular resonance in this proceeding: among the most significant barriers to deployment of advanced telecommunications facilities are regulatory classification schemes designed for an era when only a single local exchange carrier provided "last mile" services. Whatever merit that regulatory regime might have for incumbents, it is wholly inappropriate for emerging wireless providers of high bandwidth services. The Commission should not view this proceeding as an invitation to regulate services where regulation is not necessary. Rather, this proceeding presents the Commission with an opportunity to redefine its agenda for fixed wireless broadband providers in terms of *deregulation*, so that barriers to market entry are eliminated and false regulatory distinctions between like services are avoided.

To attain that objective, the Commission must first affirm that where a fixed wireless broadband provider is deemed to be providing "telecommunications service," the Commission will exercise its authority under Section 10 of the 1996 Act to forbear from imposing inappropriate Title II regulation unless it determines that the fixed wireless broadband provider is capable of wielding market power. The Commission has already determined that "when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets," it is necessary "to consider carefully whether, pursuant to [its] authority under Section 10 of the Act, to forbear from imposing any of the rules" that would apply to telecommunications carriers. WCA agrees - - Section 10 militates strongly not only in favor of extending forbearance to fixed wireless telecommunications carriers in a manner that parallels that already accorded to the CMRS industry, but also for extension of that forbearance.

Second, the Commission must also affirm that "information services" will continue to remain unregulated under Title II of the Communications Act of 1934, as amended, even when offered by a facilities-based provider that owns or leases the underlying transmission facilities.

As reflected in the OPP's working Paper on the provision of Internet access by cable operators, the Commission is still struggling with the question of how such "hybrid services," can be fitted into the historical regulatory dichotomy between "basic" and "enhanced services," and the 1996 Act's dictionary between "telecommunications services" and "information services." It is absolutely critical that the Commission resolve that issue in a manner that limits, rather than extends, the reach of Title II, and provides fixed wireless broadband providers with certainty as to the circumstances under which types of advanced service offerings will be subject to Title II regulation.

Finally, WCA urges the Commission to use this proceeding as a springboard for eliminating inconsistent regulation of service providers that creates unnecessary barriers to market entry. Simply stated, there is no sound policy for imposing fundamentally different regulations on wireless providers solely on the basis of the frequencies they use and the services which they choose to provide. Yet that is precisely the effect of the Commission's current regulatory scheme. WCA herein recommends changes to the Commission's rules that will eliminate this "unlevel" playing field.

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**COMMENTS OF THE WIRELESS COMMUNICATIONS
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The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Inquiry* ("NOI") in the above-referenced proceeding.^{1/}

I. INTRODUCTION

WCA is the principal trade association of the fixed wireless broadband communications industry. Its membership includes a wide variety of Commission licensees, wireless broadband telecommunications system operators, equipment manufacturers and consultants interested in the domestic deployment of spectrum at 2.1 GHz, 2.3 GHz, 2.5 GHz, 18 GHz, 24 GHz, 31 GHz and 38 GHz allocated generally to the Multipoint Distribution Service ("MDS"), Wireless Communications Service ("WCS"), Instructional Television Fixed Service ("ITFS"), Digital Electronic Message Service ("DEMS"), Local Multipoint Distribution Service ("LMDS") and

^{1/} FCC 98-187 (rel. Aug. 7, 1998).

Private Operational Fixed Service ("OFS") for the provision of fixed wireless broadband telecommunications services. WCA's members are at the forefront of "the arrival of broadband communications services of the twenty-first century,"^{2/} and thus have a direct and substantial interest in this proceeding.

Recent events at the Commission and in the marketplace confirm that the *NOI* could not be more timely. Within the past year, the Commission has proposed and will soon adopt new rules authorizing two-way use of MDS and ITFS frequencies in the 2.1 and 2.5 GHz bands;^{3/} concluded its proceeding relocating DEMS licensees from the 18 GHz band to the 24 GHz band;^{4/} auctioned and commenced licensing of spectrum in the 28 and 31 GHz bands for LMDS providers;^{5/} and adopted service area and licensing rules for OFS licensees in the 38 GHz band.^{6/}

^{2/} *NOI* at ¶ 1.

^{3/} See *Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, 12 FCC Rcd. 22174 (1997) [the "MDS/ITFS Two-Way NPRM"].

^{4/} See *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Services*, 12 FCC Rcd. 3471 (1997), *recon. denied*, FCC 98-155 (rel. July 17, 1998).

^{5/} See *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545 (1997) [the "LMDS Order"].

^{6/} See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz Bands*, ET Docket No. 95-183, FCC 97-391 (rel. Nov. 3, 1997). The Commission also approved rules permitting point-to-multipoint operations by 38 GHz licensees in addition to their existing point-to-point operation. *Id.* at ¶ 20.

The confluence of these regulatory developments has provided the fixed wireless broadband industry with unprecedented opportunities to offer advanced telecommunications capability for the first time in national and local markets, to the benefit of millions of consumers who heretofore have not a full range of choices among service providers.

The need for increasing the bandwidth available to all Americans is patent. As was recognized last year in the Office of Plans and Policy Working Paper, *Digital Tornado: The Internet and Telecommunications Policy* ("Digital Tornado"):

The Internet is only useful to people if they are able to access it, and the value of the Internet is, to an increasing extent, dependent on the level of bandwidth available to end users. Thus, issues of service availability and affordability, especially with regard to services that provide higher bandwidth than analog POTS lines, will be central to the development of the Internet as a mass-market phenomenon that benefits all Americans.¹⁷

There is little question that fixed wireless broadband technology represents a cost-efficient, *near-term* solution to the "last mile" problem which has prevented widespread deployment of advanced telecommunications capability to all Americans.¹⁸ As has been recognized in *Digital Tornado*, the *NOI* and elsewhere, wireless technology can be readily deployed to provide the high-capacity links that new service offerings demand, and can provide

¹⁷ Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series 29, at 73 (March 1997)[*"Digital Tornado"*].

¹⁸ See, e.g., *NOI* at ¶ 19 ("The incumbent LECs possess wire facilities that go the last mile to nearly every home and business in the United States. The last part of these last miles generally consists of copper that, as now used, lacks advanced telecommunications capability.").

those links more quickly and at lower cost than wired competitors.^{2/} As the Commission develops its agenda for expediting the availability of advanced telecommunications capabilities to all Americans, the ability of point-to-multipoint wireless technologies to make service available throughout a community rapidly and in a cost-effective manner cannot be ignored.

Furthermore, in addition to their faster time to market and relative cost advantages, fixed wireless broadband providers are able to offer greater bandwidth to their customers, and thus are

^{2/} See *Digital Tornado*, at 74-75; *NOI* at ¶¶ 42-44; *Two-Way NPRM*, note 3 *supra*; *LMDS Order*, note 5 *supra*; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market - Conditions With Respect to Commercial Mobile Services*, FCC 98-91, Appendix F at F-1 (rel. June 11, 1998) ("The frequencies offer great bandwidth, with data transfer rates of up to 55 Mbs (DS-3 capability), which is 1,500 times faster than the standard dial-up modems (28.8 Kbps) and 350 times faster than the ISDN line currently in use (128 Kbps). Once point-to-multipoint technology is implemented, transmission speed will be even faster. . . Such speed is favorable to bandwidth intensive "multi-media applications such as voice and video clips which are becoming more popular on the Internet.") (the "*Third Annual CMRS Competition Report*"); *id.* at F-12 ("Several other factors bode well for broadband fixed wireless providers. . . These include: . . . the ability to bundle services from a versatile spectrum base that is already used to offer local, long-distance and Internet access in one package."); Schofield, "Third Rail Wireless Becomes First MMDS Based CLEC," *Wireless Voice Video Data*, at 14 (May/June, 1998) ("Third Rail is currently providing customers with a variety of broadband communications services, including high speed Internet access, video conferencing, and IP telephony in the Nashua market. . . 'One key to our system is the ability to provide customers with a scalable bandwidth solution,' says [Michael] Bouchard [Director of Services for Third Rail]. 'Customers can start with a 56 Kbps line and upgrade all the way to a 10 Mbps line seamlessly. We closely monitor the performance of each line to inform customers of their bandwidth needs. We can instantly upgrade or downgrade a customer's service to properly match their usage.'"); Britton, "The Broadband Wireless Revolution," *Private Cable & Wireless Cable*, at 37 (June, 1998) ("The modular design and flexibility of broadband wireless access networks allow operators to easily expand their service and coverage areas as customer demands grow and change. . . Wireless local loops can be deployed rapidly and require less maintenance than traditional wireline networks, thereby resulting in a faster return on investment. Not only do the demand-based buildout and efficient use of spectrum meet the needs of today, but they also allow operators to prepare for the demands of tomorrow.").

especially well-equipped to provide high-speed Internet access, data transmission and many other advanced services in packages that are precisely tailored to the customer's needs. And, unlike their wired counterparts, fixed wireless broadband providers are capable of offering these services ubiquitously. Recent trade press reports stress that it is for this very reason that MDS operator People's Choice TV Corp. ("PCTV") has enjoyed considerable initial success with its wireless SpeedChoice Internet access service in the Phoenix market, notwithstanding competition from other high-speed Internet access services offered by the incumbent LEC and cable operator.^{10/} Because nearly 95% of the Phoenix market is within "line of sight" of PCTV's primary wireless transmitter, the company has been able to offer SpeedChoice on a marketwide basis from the date of launch; by contrast, the competing wire-based Internet access services are available to less than half of the greater Phoenix area.^{11/}

Similarly, during 1997 American Telecasting, Inc. ("ATI") launched a commercial high-speed Internet access service using MDS channels. The service is currently available in Colorado Springs and Denver, Colorado, and in Portland, Oregon; ATI anticipates initiating service in Seattle, Washington during the third quarter of 1998.^{12/} As noted in a recent filing with the Commission by ATI's President and CEO, Robert Hostetler:

The high cost of constructing a wired infrastructure has deterred wired telecommunications providers from making broadband

^{10/} See Hogan, "Desert High-Speed Data Duel," *Multichannel News*, at 10 (Sept. 7, 1998).

^{11/} *Id.*

^{12/} *Ex Parte* Letter from Robert Hostetler, President and CEO of American Telecasting, Inc., MM Docket No. 97-217 and RM-9060, at 1 (filed July 6, 1998).

services widely available at reasonable rates. Wireless cable operators, however, can bring broadband services to the public at far lower cost. Moreover, the superiority of wireless cable is enhanced by the propagation characteristics of the 2 GHz band where MDS and ITFS operate. . . MDS and ITFS can provide two-way high speed broadband communications over long distances . . . Everything else being equal, MDS and ITFS should be able to provide broadband service at the lowest possible cost because of lower infrastructure costs.^{13/}

Nonetheless the market for fixed wireless services is just beginning to develop,^{14/} and thus it is absolutely critical both for the fixed wireless broadband industry and consumers that the Commission remain on the deregulatory course it appears to be charting in the *NOI*. Accordingly, for the reasons set forth below, WCA submits that the public interest objectives of this proceeding will be satisfied only if the Commission (1) adopts Title II forbearance as the foundation of any regulatory policy for fixed wireless Telecommunications services; (2) affirms that information service providers will not be subject to Title II common carrier regulation, even where they provide such service over their own transmission facilities; and (3) modifies or eliminates rules which create different regulatory schemes for similar services, or which otherwise prevent fixed wireless broadband providers from deploying advanced telecommunications capability as aggressively as their competitors.

^{13/} *Id.* at 2.

^{14/} *Third CMRS Competition Report*, Appendix F at F-8.

II. DISCUSSION

A. *Forbearance Should Be Cornerstone of Any Regulatory Policy for Promoting Market Entry by Fixed Wireless Broadband Service Providers Who Are Providing Advanced Telecommunications Services.*

WCA applauds the Commission for its apparent recognition that a pro-competitive, deregulatory framework is essential to ensure the continued expansion of advanced telecommunications capability via fixed wireless technology.^{15/} The Commission has also observed, however, that regulatory barriers may exist “to greater, more widespread deployment of high-bandwidth wireless systems.”^{16/} For the reasons set forth below, WCA submits that the Commission can take a significant step toward promoting the deployment of high capacity wireless systems by exercising its Title II forbearance authority under Section 10 of the

^{15/} See, e.g., *NOI* at ¶ 5 (“We intend to rely as much as possible on free markets and private enterprise to deploy advanced services.”). In enacting the 1996 Act, Congress recognized wireless carriers’ potential contribution to local competition. See 47 U.S.C. §§ 153(26) (authorizing Commission to classify commercial mobile service provider as “local exchange carrier”), 332(c)(7)(C)(i) (defining “personal wireless services” to include “common carrier wireless exchange access services”); see also H.R. Conf. Rep. No. 104-458, at 209 (1996) (facilities siting provisions of Section 332(c)(7) apply to “wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum”); *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, Memorandum Opinion and Order*, 11 Comm. Reg. (P&F) 328, ¶ 72 (rel. Feb. 4, 1998) (interpreting Section 271(c)(1)(A) to not preclude PCS from being considered “facilities-based competitors” to BOCs).

^{16/} *Third CMRS Competition Report*, Appendix F at F-10; *NOI* at ¶ 43.

Telecommunications Act of 1996 (the "1996 Act") to facilitate fixed wireless provision of advanced telecommunications services.^{17/}

The Commission has determined that "when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets" it is necessary "to consider carefully whether, pursuant to [its] authority under section 10 of the Act, to forbear from imposing any of the rules" that would apply to telecommunications carriers.^{18/} WCA agrees. Indeed, Section 10 *requires* that the Commission extend forbearance to fixed wireless telecommunications carriers, provided that the conditions of Sections 10(a)(1)-(3) are met.^{19/} The conditions of Sections 10(a)(1)-(3) are satisfied where the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with

^{17/} The Commission has determined that Section 706(a) of the 1996 Act does not constitute an independent grant of forbearance authority. Instead, it directs the Commission to use the authority granted in other provisions, including the forbearance authority under Section 10, to encourage deployment of advanced services. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-188, at ¶¶ 69-78. (rel. Aug. 7, 1998).

^{18/} See *Federal-State Joint Board on Universal Service, Report to Congress*, CC Docket No. 96-45, FCC 98-67, ¶¶ 90-92 (released Apr. 10, 1998) [the "*Universal Service Report*"].

^{19/} Specifically, the statute provides that where the conditions of Sections 10(a)(1)-(3) are satisfied, "the Commission *shall forbear* from applying *any* regulation or any provision of this Act to a *telecommunications carrier or telecommunications service*, or *class of telecommunications carriers or telecommunications services*, in any or some of its or their geographic markets." 47 U.S.C. § 160(a) (emphasis added). A telecommunications carrier, in turn, is defined as "*any provider of telecommunications services. . . .*" *Id.* § 153(44) (emphasis added).

that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.^{20/}

When molding the "public interest" determination, the Commission "*shall*" consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services.^{21/} The Section 10 grounds for forbearance exist with respect to virtually all fixed wireless broadband providers, and indeed the Commission has already exercised limited Section 10 forbearance with respect to Part 21, Part 27 and Part 101 licensees.^{22/}

At a minimum, the Commission should exercise its Section 10 authority to forbear from imposing on fixed wireless telecommunications carriers those Title II provisions that it already forbears from applying to CMRS licensees (to the extent that those provisions apply to fixed

^{20/} 47 U.S.C. § 160(a)(1)-(3).

^{21/} 47 U.S.C. § 160(b).

^{22/} See *Federal Communications Bar Ass'n's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers* and *PCIA's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, *Memorandum Opinion and Order*, FCC 98-18, ¶ 24 (rel. Feb. 4, 1998) (codified at 47 C.F.R. §§ 27.324(a)(3), 101.53(a)(1) (WCS and common carrier point-to-point microwave services, respectively)).

wireless providers) under Section 332(c)(1) of the 1934 Act. In the CMRS context, the Commission has determined:

In a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.^{23/}

For these reasons, the Commission decided to forbear from enforcing Sections 203, 204, 205, 211 and 214 on CMRS providers — *notwithstanding* its conclusion that some CMRS licensees, at the time, exercised market power.^{24/}

Although Section 10 and Section 332(c)(1) differ in scope, the Commission has recognized that they “set forth similar three-pronged tests that must be met in order for us to exercise our forbearance authority.”^{25/} It is beyond dispute that all fixed wireless telecommunications carriers are new entrants with no market power and, at most, *de minimis* market share, and thus Commission precedent warrants a presumption of forbearance where fixed wireless licensees are providing telecommunications services.^{27/} Indeed, the Commission

^{23/} *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1478 (1994).

^{24/} *Id.* at 1467, 1478-1481.

^{25/} *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, FCC 98-134, WT Docket No. 98-100 (rel. July 2, 1998).

^{27/} Cf. Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series No. 30, at 117 (August 1998) (“Any regulatory efforts in this arena should begin with an analysis of whether the operator in question exercises undue market power.”) (“*Internet Over Cable*”).

has already determined that such entities currently have a relatively small market share in the provision of local exchange and exchange access service and that “non-[ILECs] should be treated as nondominant in the provision of terminating access.”^{28/} For that reason, the Commission determined to “not adopt at this time *any regulations* governing the provision of terminating access provided by [CLECs].”^{29/} For similar reasons, the Commission exercised its Section 10 authority to forbear from enforcing mandatory access tariffing for CLEC providers of interstate exchange access services.^{30/}

In addition, a number of recent Commission policies and actions ensure that there will be enormous variety and customer choices for fixed wireless broadband services, and that an intrusive regulatory policy therefore is unnecessary to ensure that fixed wireless broadband providers bring advanced services to the marketplace as quickly as possible. Indeed, the Commission has made enormous amounts of bandwidth available for fixed wireless

^{28/} See *Access Charge Reform/Price Cap Performance Review For Local Exchange Carriers/Transport Rate Structure And Pricing/End User Common Line Charges, First Report and Order*, 12 FCC Rcd. 15982, ¶¶ 16140-61 (1997).

^{29/} *Id.*, 12 FCC Rcd. at 16141, ¶ 363 (emphasis added).

^{30/} See *Hyperion Telecommunications, Inc.*, 12 FCC Rcd. 8596, 8623-29 (1997). Furthermore, there are a number of pending Section 10 petitions that may be of relevance to fixed wireless telecommunications carriers. Certain parties have petitioned the Commission to forbear from imposing certain of its Customer Proprietary Network Information (“CPNI”) rules on telecommunications carriers (CC Docket No. 96-115). Similarly, a number of wireless carriers have petitioned for forbearance from imposing Section 254(g)’s rate integration requirement on CMRS providers (CC Docket No. 96-61).

telecommunications services in recent years.^{31/} In addition, CMRS licensees, many of which are established cellular and PCS companies, are authorized to provide fixed services on their CMRS frequencies on a co-primary basis.^{32/}

In sum, it is clear that the Commission has come to rely, with good success, on the marketplace rather than regulation to foster the growth of CMRS services. Consequently, it should do the same with respect to the promotion of advanced telecommunications capability via fixed wireless technology and forbear from imposing unnecessary Title II regulation on fixed wireless broadband service providers except in those cases where the Commission finds that market power is being exercised.

B. The Commission's Regulatory Framework for Promoting Deployment of Advanced Telecommunications Capability Must Refrain from Imposing Title II Regulation on "Information Services" Offered Over Wireless Facilities Owned by the Service Provider.

As the Commission examines mechanisms for expanding the provision of advanced telecommunications capabilities, the Commission must take into consideration the likelihood that

^{31/} *LMDS Order*, 12 FCC Rcd. at 12636-39 (authorizing LMDS licensees to provide telecommunications services); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the MDS and ITFS, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Report and Order*, 10 FCC Rcd. 9589, 9619, App. D (1995) (authorizing MDS to select either common carrier or non-common carrier regulatory status); *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Report and Order*, 11 FCC Rcd. 2429, 2436 (1996) (authorizing fixed satellite service systems to select either common carrier or non-common carrier regulatory status).

^{32/} 47 C.F.R. §§ 22.901(d), 24.3; *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965 (1996).

in many cases, particularly those involving high-speed Internet access, "information services" will be provided over wireless facilities owned by the service provider. As set out in great detail in the recent OPP Working Paper on the provision of Internet services by cable television systems, *Internet Over Cable: Defining the Future in Terms of the Past* ("Internet Over Cable"), the issue of how to reconcile the "convergence and interdependence of communication data processing technologies" with the strictures of Title II common carrier regulation has been one of the most difficult controversies before the Commission over the past thirty years.^{33/}

Initially, in its *Computer I* decision, the Commission determined not to regulate "data processing" services, which it found were being offered on a highly competitive basis.^{34/} "Hybrid" services, which the Commission defined as offerings that combine remote access data processing and message-switching to form a single integrated service, were to be treated as either data processing or communications services, based on case-by-case determinations as to which of the two functions were predominant in the particular hybrid service.^{35/} Subsequently, in its landmark *Computer II* decision, the Commission introduced the concepts of "basic" and "enhanced" services, subjecting the former but not the latter to Title II common carrier regulation. Enhanced services were defined as "any offering over the telecommunications

^{33/} See *Internet Over Cable* at 25, quoting *Regulatory Policy Problems Presented by the Interdependence of Computer and Communication Facilities*, 7 FCC Rcd. 11, 12 (1996).

^{34/} *Id.* at 27 [discussing *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services Facilities- Final Decision and Order*, 28 F.C.C. 2d 226 (1971).].

^{35/} *Id.*

network which is more than a basic transmission service,” and as “combin[ing] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber with additional, different, or restructured information, or involve subscriber interaction with stored information.”^{36/} Critical to the Commission’s “basic/enhanced” dichotomy was the idea that while enhanced services may include a communications component, they also include a substantial data processing component over which the Commission had never imposed jurisdiction.^{37/}

Even more fundamentally, however, the Commission’s definitions of basic and enhanced services arose from the agency’s concern that local exchange carriers might use their control over bottleneck facilities to toward competition in the market for advanced service offerings. As observed in *Internet Over Cable*,

[T]he Commission’s primary concern was in setting up definitional categories and regulatory consequences that would curtail the potential for anticompetitive conduct that could result from telephone carrier participation in competitive markets by means of integrated operations and service offerings. Of particular concern was that carriers with local telephone distribution networks could use their control over basic services to discriminate against other enhanced service providers’ (ESPs) services and products, as well as with the potential for anticompetitive cross-subsidization from

^{36/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations (second Computer Inquiry (Final Decision)*, 77 F.C.C.2d 384, 387 (1980) [“Computer IP”].

^{37/} *Id.*, 77 F.C.C. 2d at 435 [“Any agency regulatory decision in this area must assess the merits — as we do in this order — of extending regulation to an activity simply because a part of it is subject to the agency’s jurisdiction where such regulation would not be necessary to protect or promote some overall statutory purpose.”].

unregulated to regulated activities. To guard against such abuses, the Commission required the major carriers with local distribution networks, . . . , to provide enhanced services and CPE only through corporate affiliates fully separated from their basic services operations.^{38/}

Moreover, as noted in the Commission's recent report to Congress on universal service, the 1996 Act essentially retained the "basic/enhanced" dichotomy established in the Commission's *Computer II* decision, and Congress therefore intended that "information services" should continue to be unregulated even when they are provided by common carriers already regulated under Title II:

[T]he categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive. . . . Congress intended these new terms to build upon frameworks established prior to the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to be mutually exclusive, like the definitions of "basic service" and "enhanced service" developed in [the Commission's] *Computer II* proceeding. . . . *We find generally, . . . , that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services "via telecommunications."*^{39/}

Regardless of how the Commission ultimately chooses to define the term "advanced telecommunications capability" in this proceeding, that term undoubtedly will encompass hybrid

^{38/} *Internet Over Cable* at 31 (footnotes omitted).

^{39/} *Universal Service Report* at ¶ 6 (emphasis added). In implementing the non-accounting safeguard provisions of the 1996 Act, the Commission concluded that all of the services "previously considered to be enhanced services are information services." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, 21956 (1996) ("*Non-Accounting Safeguards*").

services, *e.g.*, those in which a wireless provider offers a transmission component as an inseparable part of an information service.^{40/} In its *Universal Service Report*, the Commission advised Congress that “hybrid services are information services, and are not telecommunications services.”^{41/} In addition, the Commission advised that this conclusion gives effect to “Congress’ direction that the classification of a provider should not depend on the type of facilities used,”^{42/} and that, in the case of hybrid services, the question becomes, “functionally, [is] the consumer receiving two separate and distinct services.”^{43/}

WCA therefore urges the Commission to acknowledge that fixed wireless broadband providers who provide information services do not and should not become subject to Title II regulation simply because they offer those services over their own transmission facilities. As discussed above, the Commission adopted the “basic/enhanced” dichotomy to preclude local exchange carriers from using their control over basic services to discriminate against nonaffiliated enhanced service providers, and from engaging in anticompetitive cross-subsidization between their regulated and unregulated activities. Fixed wireless broadband providers, by contrast, generally have little or no market power, and thus have no ability or

^{40/} See *Universal Service Report* at ¶ 56 (“We understand [hybrid services] to refer to services in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, *and* as an inseparable part of that service transmits information supplied or requested by that user.”).

^{41/} *Id.* at ¶ 57.

^{42/} *Id.* at ¶ 58

^{43/} *Id.* at ¶ 60.

incentive to behave in an anticompetitive manner. Accordingly, it simply is unnecessary to impose Title II regulation on fixed wireless information services to ensure full and fair competition in the telecommunications marketplace.

Moreover, imposing Title II regulation on the provision of information services via fixed wireless facilities would substantially undermine Congress's broader objective of ensuring that advanced information services are deployed as widely and quickly as possible. Implicit in the 1996 Act is a recognition that the prior regulatory regime imposed unnecessary constraints on new market entrants, and that a modified regulatory paradigm is required in order to remove barriers to market entry and promote aggressive deployment of advanced services to all market segments. Simply stated, fixed wireless broadband providers cannot give effect to Congress's Section 706 mandate if they are shackled by Title II regulations that delay or discourage their deployment of advanced services or otherwise give certain providers greater competitive advantages than others.

Finally, in the event that the Commission eventually finds it necessary to impose Title II regulation on certain specialized hybrid services WCA requests that such services be defined as precisely as possible, so that fixed wireless broadband providers have notice as to which of their hybrid services are regulated, and how the relevant regulations will affect their ability to deploy advanced telecommunications capability as quickly as possible.^{44/} As the Commission

^{44/} For example, the Commission has suggested that phone-to-phone Internet Protocol ("IP") telephone services are more akin to "telecommunications services" than "information services." *Universal Service Report* at ¶ 55.

noted in its *Non-Accounting Safeguards* decision, deregulation of “information services” is designed to “[provide] a measure of regulatory stability for telecommunications carriers and [Internet Service Providers] alike, by preserving the definitional scheme under which the Commission exempted certain services from Title II regulation.”^{45/} By contrast, vague or open-ended definitions of which types of advanced services constitute “information services” create substantial regulatory *instability* that only discourages new market entrants from making the enormous capital expenditures necessary to deploy advanced services in the manner desired by Congress. That scenario in no way serves the best interests of consumers, and the Commission therefore must take care to ensure that it does not occur.

C. The Commission Should Exercise Its Broad Authority to Eliminate Third-Party Barriers That Block Market Entry by Fixed Wireless Broadband Providers, As It Has Done For Mobile Providers And Alternative Multichannel Video Programming Distributors.

Throughout the 1996 Act, Congress recognized that State and local regulations, as well as restrictions imposed by private property owners, often prevent telecommunications providers, alternative multichannel video programming distributors (“MVPDs”) and television broadcast stations from offering service. Congress further recognized that such regulations and restrictions undermine the Commission’s exclusive authority to regulate interstate communications, and threaten competition by subjecting service providers to an unmanageable patchwork of inconsistent requirements that discourage aggressive, widesale provision of competitive

^{45/} *Non-Accounting Safeguards*, 11 FCC Rcd. at 21956 (1996.)

telecommunications, multichannel video and television broadcast services. Accordingly, the 1996 Act includes a series of provisions which, for example:

- generally prohibit state and local authorities from imposing any requirement that prohibits or has the effect of prohibiting the provision of any interstate or intrastate telecommunications services;^{46/}
- impose limitations on state or local regulation of the placement, construction and modification of facility for “personal wireless services”;^{47/}
- requires the Commission to prohibit restrictions that “impose a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services”;^{48/} and
- generally preempts state or local regulations of “personal wireless service facilities on the basis of the environmental effect of radiofrequency (RF) emission.”^{49/}

In addition, the Commission, pursuant to its authority under Section 624(i) of the Cable Consumer Protection Act of 1992 and Section 4(i) of the Communication Act of 1934, as amended, has established new procedures under which alternative MVPD may obtain access to

^{46/} 47 U.S.C. § 253(a).

^{47/} 47 U.S.C. § 332(c)(7).

^{48/} 1996 Act, § 207.

^{49/} 47 U.S.C. § 332 (c)(7)(B)(iv). The 1996 Act also includes provisions which generally preclude local authorities from requiring cable operators to obtain a cable franchise for the provision of telecommunications services, and which preempt local taxation of direct-to-home satellite services. *See* 47 U.S.C. § 541 (a)(3)(AA); 1996 Act, § 602.

cable inside wiring within multiple dwelling units (“MDUs”) where the incumbent cable operator’s service is terminated.^{50/}

Clearly, widespread, near-term deployment of advanced telecommunications capability cannot be achieved if fixed wireless broadband providers are not accorded the same protections from third-party entry barriers that are accorded to others. Moreover, WCA submits that the Commission has ample statutory authority to “fine tune” its regulatory framework for nondominant telecommunications carriers as suggested herein, even in the absence of an express statutory directive to do so. Section 10(a)(3) of the 1996 Telecom Act, for example, gives the Commission broad latitude to create regulatory symmetry between like service providers where the public interest so requires.^{51/} Moreover, as the Commission pointed out at length in its recent *Inside Wiring R&O*, Section 4(i) of the Communications Act of 1934, as amended, permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions.”^{52/} Accordingly, WCA recommends that the Commission take the actions suggested below in order

^{50/} *Telecommunications Services - Inside Wiring*, 13 FCC Rcd. 3659 (1997) (“*Inside Wiring R&O*”).

^{51/} See 47 U.S.C. § 160(a)(3).

^{52/} *Telecommunications Services - Inside Wiring*, 13 FCC Rcd. at 3700, citing 47 U.S.C. § 154(i); see also *North American Telecomm. Ass’n v. FCC*, 772 F.2d 1282, 1289-93 (7th Cir. 1985) (Section 4(i) “empowers the Commission to deal with the unforeseen — even if that means straying a little way beyond the apparent boundaries of the Act — to the extent necessary to regulate effectively those matters already within the boundaries.”).